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NO. 86-464

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, et al.,

Petitioners

v.

JYRL JAMES-MASSENGALE, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below correctly characterized California's compensatory "makewhole" remedy, designed to reimburse agricultural employees for losses suffered as a result of an employer's unlawful refusal to bargain, as "an award of damages" rather than a State-created ERISA[1/] plan.

2. Whether the Court of Appeals was correct in giving weight and effect to all words contained in section 514(a) of ERISA, rather than considering the words "relate to" in isolation.

3. Whether the court below correctly determined that Congress, in passing ERISA, did not intend to

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1. Employee Retirement Income Security Act (29 U.S.C. sec. 1001 et.seq.).

prevent a state agency from fully and fairly remedying violations of the collective bargaining duty imposed by state statute.

4. Whether the Court of Appeals' opinion below conflicts with ERISA preemption cases decided by this Court under fundamentally different facts.

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REASONS FOR DENYING THE WRIT

Summary of Argument

The Court of Appeals' interpretation of the scope and purpose of section 514 of ERISA is correct.

Petitioners object to the court's holding that preemption can only be found where a defendant "purports to regulate directly or indirectly, the terms and conditions of employee benefit plans." Yet that requirement is dictated by ERISA itself in section 514(c)(2), and has previously been recognized by this Court and other appellate courts.

Petitioners further claim that the opinion below is in direct conflict with three decisions of this Court. Yet an examination of those cases reveals that they concerned very different facts; the challenged state laws therein manifestly purported to regulate ERISA plans, and therefore satisfied the element of

preemption which petitioners seek to eliminate from ERISA. In contrast, the California laws challenged here -- the State's collective bargaining statute and the ALRB's[2/] compensatory "makewhole" remedy for certain bargaining violations -- do not purport to regulate ERISA plans in any fashion. Though petitioners seriously mischaracterize those laws in their attempt to construct a case for preemption, the Court of Appeals correctly concluded, after due consideration, that their claim has no merit and that their expansive theory of preemption would lead to unfair and absurd results.

Even if petitioners had, arguendo, established a state law which purported to regulate the terms and conditions of ERISA plans, the same result affirmed by the Court of Appeals -- summary judgment for

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2. Agricultural Labor Relations Board.

defendants -- would obtain. This is so because collective bargaining statutes like the California ALRA[3/] are exempt from ERISA's preemption provision. ERISA, corresponding provisions of the Internal Revenue Code, and court decisions interpreting section 514 all contemplate that employees' collective bargaining rights will not be diminished by ERISA. Petitioners' preemption theory would undermine those rights, encourage unfair labor practices, impoverish innocent employees, and guarantee the unjust enrichment of wrongdoers.

For these reasons, respondents submit that the court below correctly interpreted and applied ERISA's preemption provisions, and correctly rejected petitioners' various arguments. Accordingly, the petition should be denied.

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3. Agricultural Labor Relations Act. (California Labor Code sections 1140 et seq.)

I

THE DECISION BELOW IS PERFECTLY CONSISTENT WITH THIS COURT'S INTERPRETATIONS OF ERISA PREEMPTION

A. The Court of Appeals Properly Considered The Entirety of ERISA Section 514(a), Rather Than Isolating Two Words Out of Context As Petitioners Propose.

As the Court of Appeals correctly noted, plaintiffs' ERISA preemption claim here was based exclusively on section 514(a) of ERISA (29 U.S.C. §1144(a)). (See Pet. App., 155a, 156a.)[4/] That section provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Petitioners urge this Court to focus only on the two words "relate to," construing them in the broadest possible manner while ignoring the remainder of the statutory language.

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4. "Pet. App." refers to the Appendices to the Petition for a Writ of Certiorari. "Pet." will refer to the Petition itself.

However, as noted in the decision below (Pet. App., 156a), section 514(a) includes other essential terms which are expressly defined elsewhere in the body of ERISA and which cannot be disregarded in analyzing the scope and intent of the preemption provision. Most telling is Congress's definition of "State" as:

> ...a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans...

(ERISA section 514(c)(2); emphasis added.)

Petitioners suggest that the Court of Appeals created from whole cloth a new exception to preemption when it held that the ALRB's makewhole power was preempted only "if it both 'relate[s]' to an ERISA plan and 'purport[s] to regulate, directly or indirectly' ERISA plans." (Pet. App., 155a.) Yet it is plain that section 514

itself creates this two-prong test for preemption, and that the court's analysis is consistent not only with express statutory definitions, but also with other decisions addressing the question. (See, e.g., Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984); Rebaldo v. Cuomo, 749 F.2d 133, 137 & n.1 (2d Cir. 1984), cert. den., 105 S.Ct. 2702 (1985); Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 329 (2d Cir. 1982), aff'd. mem. sub. nom. Arcudi v. Stone & Webster Engineering Corp, 643 U.S. 1220 (1983) [to be preempted, state law must both "relate to" and "purport to regulate" ERISA plans].)

ERISA preemption has never been established merely by the fact that a state agency or court acknowledges, notes, makes reference to, observes, or compares employee benefit plans, as petitioners urge. Such an irrational, all-encompassing

approach would lead to absurd results. (See Argument III, infra.) Rather, the party invoking preemption must show that the state decision, policy, or statute purports to somehow regulate, directly or indirectly, the plans. The California statute and ALRB orders challenged here do not. (See Argument II, infra.)

B. The Cases Relied On By Petitioners Are Readily Distinguishable on Their Facts.

Petitioners assert that there is a "direct conflict" between the court's application of section 514 below and this Court's discussions of ERISA preemption in Shaw v. Delta Air Lines, 463 U.S. 85 (1983), Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), and Metropolitan Life Ins. Co. v. Massachusetts, ___U.S.___ [105 S.Ct. 2380] (1985). In fact, there is no conflict. Instead, the distinctions between the

present case and the other three (Alessi, Shaw, and Metropolitan) derive from the different facts involved. This Court was not required to undertake the analysis followed by the Court of Appeals herein because, unlike the instant case, Alessi, Shaw, and Metropolitan involved state laws which plainly "purported to regulate, directly or indirectly," the terms and conditions of ERISA plans. Any discussion of that element of preemption would therefore have been quite unnecessary in those cases.

This Court's own descriptions make the point. In Metropolitan, the challenged state statute was:

> A Massachusetts statute requir[ing] that specified minimum mental-health-care benefits be provided a Massachusetts resident who is insured under a general insurance policy, an accident or sickness insurance policy, or an employee health-care plan that covers hospital and surgical expenses.

(105 S.Ct. at 2383.) In Shaw, the New York Human Rights Law prohibited a private employer from maintaining an "employee benefit plan [which] treats pregnancy differently from other nonoccupational disabilities." (463 U.S. at 88.) And in Alessi, this Court addressed a New Jersey statute which "eliminates one method of calculating pension benefits -- integration -- that is permitted by federal law." (451 U.S. at 524.)[5/] As noted by this Court, each statute intruded directly into ERISA's domain, purporting to regulate employee benefit plans. There is no parallel intrusion in the instant case. (See Argument II, infra.) Hence, there is no "conflict" requiring this Court's attention.

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5. It is noteworthy that the Alessi opinion quotes, with emphasis, the definition of "State" relied upon by the court below -- the definition which petitioners now ask this Court to delete from ERISA. (See 451 U.S. at 525.)

Indeed, as the Court of Appeals noted below, past applications of ERISA preemption have stemmed from four general categories of purported state regulation of benefit plans: laws regulating the type of terms or benefits offered; laws treating reporting, disclosure, vesting, or funding; laws dictating how benefits are calculated; and laws providing remedies for plan-related misconduct. (See Pet. App., 156a-158a & notes 15, 16, 17, & 18. See also findings of the district court, Pet. App., 140a-142a.) And, contrary to petitioners' claims, the state collective bargaining statutes and compensatory remedies challenged here do not even approach any of these categories, much less fall within them. Accordingly, the Court of Appeals' opinion herein creates no conflict with the authorities relied on in the petition for writ of certiorari.

II

PETITIONERS HAVE MISSTATED ESSENTIAL FACTS.

In their effort to bring the present case within the ambit of prior decisions finding ERISA preemption, petitioners have mischaracterized several significant facts. Indeed, their petition is to a large extent merely a call for reversal of various factual findings made in the trial court below -- a task not worthy of a writ of certiorari. A brief summary of the true nature of the California statute and remedies at issue will serve to emphasize that the writ should be denied.

A. California's Compensatory Makewhole Remedy For Unlawful Refusals-to-Bargain Does Not Create Benefit Plans, Require Benefit Terms, or Otherwise Regulate or Affect Existing Plans.

Petitioners assert that the ALRB "requires employers to provide a certain level of benefits on certain terms to its

employees" (Pet., 12), that the makewhole remedy "is in fact creating a benefit package" (Pet., 13), that the Board has "taken away" the employers' ERISA-protected "discretion" to design plans and to unilaterally determine benefit levels, eligibility, etc. (Pet., 6, 23), and that the State

> ...directly regulates all aspects of the benefit programs provided by the petitioners, including eligibility, participation, vesting, benefit accrual, forfeitures, tax implications, as well as disclosures.

(Pet., 16.) None of these claims is true.[6/] The same allegations were carefully considered and soundly rejected by both the Court of Appeals (Pet. App.,

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6. Petitioners assert that employees' makewhole compensation would be taxable as ordinary income rather than as an excluded ERISA benefit. (Pet., 22-23.) It is difficult to see how this fact buttresses the employers' arguments. Rather, the tax consequences seem to reinforce the Court of Appeals' holding that makewhole (a) does not affect existing plans, and (b) in no way creates new plans.

158a-162a) and the district court. (Pet. App., 140a-142a.)

As both courts recognized, the ALRB's makewhole remedy is merely an award of estimated damages. It is designed to compensate employees for losses incurred during the period when an employer's illegal conduct deprived them of their right to good faith collective bargaining. (See J.R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal.3d. 1, 31 [603 P.2d. 1306] (1979).) As the district court accurately observed below:

> The ALRB has not required plaintiffs to disburse any moneys from their existing plans, to add new provisions to such plans, to change existing provisions, to establish any new plans or trust funds, or to violate any of the fiduciary duties arising from existing plans.
>
> All the ALRB has done is to find that the plaintiffs have committed unfair labor practices, and to award compensatory damages to those employees who suffered losses as a result of plaintiffs' violations. These functions do not infringe upon or purport to regulate the field occupied by ERISA.

(Pet. App., 140a.) The Court of Appeals explained in somewhat greater detail the purpose and formulation of makewhole compensation:

> [A] "Make-whole" remedy is an award of damages designed to put workers in approximately the same economic position they would have been in had their employer bargained in good faith. This economic position can be determined only after determining the total compensation the workers would have received after good faith bargaining. The total compensation paid to any worker in normal circumstances may be paid partly in wages and partly in fringe benefits. The specific mix of wages and fringe benefits is irrelevant for the purpose of assessing damages. Regardless of the particular mix, the total value of the compensation package remains the same; if the amount of fringe benefits is greater, the amount of wages will be lesser, and vice-versa. When the ALRB decides to issue a "make-whole" award, it is only the total amount of compensation that matters. The ALRB does not order the payment of fringe benefits; rather, it requires the payment of damages in an amount equal to the difference between the estimated total value of the compensation package the employees should have received and the amount of compensation they actually received. Because the ALRB is not ordering the payment of fringe benefits, there is not even a colorable argument that it has created new ERISA plans, and the employers' second argument must fail.

(Pet. App., 159a-160a.)[7/] The ALRB and California Labor Code section 1160.3 are altogether uninvolved in the employers' existing ERISA plans; indeed, the Board does not care whether an employer even has any employee benefit plans, much less what the terms might be. As the district court noted:

> The only reference which the ALRB makes to such existing plans is to credit the employer's contributions thereto, if any, against the gross amount of employee damages.

(Pet. App., 141a.)

B. The Compensatory Makewhole Remedy is not "Open-Ended". It Stops When The Wrongdoers Cease Their Unlawful Conduct.

As additional support for their claim that the Board's damage award creates benefit plans, petitioners repeatedly

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7. Additionally, it should be noted that a plan, to be covered by ERISA, must be "established or maintained by an employer or by an employee organization, or by both..." (29 U.S.C. sec. 1002; emphasis added.) The ALRB's award of compensatory damages obviously falls outside this definition.

assert that the award represents an "ongoing obligation" which is "open-ended" and might go on "indefinitely". (See e.g., Pet., 13, 18.) They claim that the "remedy, as interpreted by [the ALRB] and enforced by California courts, is an open-ended award." (Pet., i.) In fact, both the ALRB and the California courts have taken special pains to make clear that this compensatory remedy is not "open-ended", even though the Board does not usually state -- in its initial liability decision -- a fixed date for termination of the remedy. Rather, like other economic remedies for unfair labor practices, the makewhole period ends when the wrongdoer ceases its unlawful conduct:[8/]

> The Board's order required [the wrongdoer] to make its employees whole from the date of the refusal to bargain until [it] "commences" to bargain in good faith. [Ftn. omitted]

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8. Petitioners repeatedly mischaracterize the duration of the remedy,
(Footnote Continued)

> Thus, the make-whole obligation runs only until [the employer] begins to bargain in good faith. The Board has defined good faith bargaining as such bargaining as leads to either contract or a bona fide impasse. Such an order does not compel the employer to make concessions to the Union at the bargaining table. Nor does it continue the make-whole order after commencement of bargaining in good faith. It was not an open-ended order.

(Ruline Nursery Co. v. Agricultural Labor Relations Bd., 169 Cal.App.3d 247, 264 (1985); emphasis added. See also, e.g., Transmarine Navigation Corp., 170 NLRB 389, 390 (1968).)

The Board has determined that the most fair and certain way to determine whether subsequent bargaining by the

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(Footnote Continued)

claiming that makewhole continues running until the employer and the certified union "reach agreement or reach valid impasse." (Pet., 2, 3, 6.) As the Board's orders make clear, however, the makewhole periods in fact run only until the wrongdoer "commences good faith bargaining... which results in a contract or bona fide impasse." (Pet App., 128a; emphasis added. See also 90a, 71a, 70a, 26a, 13a.)

wrongdoer is actually in good faith (as opposed to "surface bargaining" -- i.e. going through the motions of negotiating without the requisite bona fide intent to resolve differences) is to see whether the conduct leads to the appropriate result: either a collective bargaining agreement or a valid impasse. But the makewhole obligation ends before such a result, when the good faith collective bargaining begins.

III

PETITIONERS' NOVEL THEORY WOULD CREATE CHAOS IN THE LAW, AND WOULD PREVENT FULL AND FAIR COMPENSATION FOR INJURIES.

During oral argument before the Court of Appeals on March 7, 1985, counsel for petitioners was questioned about what impact the employers' theory of preemption might have in civil personal injury cases, wherein judges and juries traditionally consider lost pay -- including lost fringe benefits -- in assessing the extent of

damages. Counsel candidly admitted that, under the theory propounded by petitioners, ERISA would preempt any attempt to estimate what the fringe benefit portion of the victims' lost earnings might have been -- that is, the tribunal's mere attempt to quantify that aspect of damages would assertedly run afoul of ERISA section 514.[9/]

Such a rule has no basis either in the legislative history of ERISA or in general principles of fairness, and it would lead to chaos in and disrespect for the law.

IV

THE RESULT REACHED BELOW WOULD ALSO BE CORRECT UNDER THE THEORY, SUGGESTED BY THIS COURT'S METROPOLITAN LIFE DECISION, THAT COLLECTIVE BARGAINING STATUTES ARE EXEMPT FROM ERISA'S PREEMPTION CLAUSE.

In further support of the result reached by the Court of Appeals,

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9. Counsel for petitioners distinguished between (1) an injured person
(Footnote continued)

respondents submit that the statute and remedial orders challenged here are exempt from ERISA preemption. In Metropolitan Life, this Court ultimately determined that the disputed Massachusetts law was not preempted by ERISA because it fell within an express exemption as a law "which regulates insurance." (See 29 U.S.C. sec. 1144(b)(2)(A).) Although there is no such express statutory exemption for labor-management relations laws like the California ALRA, such an exemption is implied by various provisions of ERISA, by case law interpreting ERISA's preemption provision, and by Internal Revenue Codes effectuating ERISA's substantive guidelines.

(Footnote continued)

who lost work at a known job, in which case losses could permissibly be calculated based on existing ERISA plans, and (2) an injured person who was unemployed or who had not yet entered the labor force, in which case ERISA assertedly precludes any inquiry into the likelihood and/or probable amount of lost benefits.

A. ERISA Did Not Intend to Preempt State Laws Regulating Agricultural Labor Relations

It is well settled that Congress reserved for the states the right and authority to regulate labor-management relations among agricultural laborers. (29 U.S.C. sec. 152(3).) The ALRA is California's principal regulation in this field; several other states have similarly enacted laws to govern such employment relations. (See, e.g., United Farm Workers. v. Arizona Agricultural Employment Relations Bd., 669 F.2d 1249 (9th Cir. 1982.) Such statutes are exempt from ERISA's preemption provisions--even if they do, arguendo, "relate to" employee benefit plans--because,

> We... must presume that Congress did not intend [through ERISA] to preempt areas of traditional state regulation.

(Metropolitan Life, supra, 105 S.Ct. at 2389.) And, as the Court later noted,

> States possess broad authority

> under their police powers to regulate the employment relationship to protect workers within the State.

(Id., at 2398, quoting from De Canas v. Bica, 424 U.S. 351, 356 (1976).)

Thus, it must be presumed that Congress did not intend to preempt California's collective bargaining laws. This presumption is especially compelling given the fact that ERISA itself does not purport to protect or regulate collective bargaining; rather, ERISA expressly acknowledges and defers to labor-management relations laws, as will be shown below.

B. ERISA Itself Presupposes The Continued Vitality of Collective Bargaining Statutes, And Acknowledges That Such Laws May Affect Plans.

The exemption for labor-management relations laws is further apparent from the very language of ERISA itself. It is evident from various provisions of ERISA that Congress intended to exempt such collective-bargaining laws from ERISA

preemption even though, as the Metropolitan Life court noted, "welfare benefits are a mandatory subject of bargaining" under such labor laws. (Metropolitan Life, supra, 105 S.Ct. at 2395.)

For example, section 515 of ERISA (29 USC sec. 1145), which defines "delinquent contributions", plainly contemplates that employees will continue to have the right to negotiate concerning ERISA-covered plans in the context of good faith collective bargaining:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Emphasis added.)

Section 4212(a) of ERISA (29 USC sec. 1392(a)), defining the obligation to contribute, demonstrates even more clearly this congressional intention to exempt

labor relations laws, even if such laws touch upon ERISA-covered benefit plans:

> (a) Definition
> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--
> (1) Under one or more collective bargaining (or related) agreements, or
> (2) as a result of a duty under applicable labor-management relations law ...

(Emphasis added.) Yet petitioners' preemption theory would have the effect of reducing employees' bargaining rights, encouraging unfair labor practices, and guaranteeing the unjust enrichment of wrongdoers. It would "violate the plain meaning" of ERISA sections 515 and 4212(a) (cf. Metropolitan Life, 105 S.Ct. at 2390.), and would eliminate or diminish employer duties and responsibilities which ERISA seeks to preserve.

C. This Court Has Similarly Assumed That Employees' Rights To Demand Good Faith Collective Bargaining Over Benefit Plans Remain Intact Under ERISA.

If the State is prevented from fully remedying bargaining violations, as petitioners urge, then bargaining duties become less enforceable and bargaining rights become illusory. That result would be inconsistent with this Court's recognition of the special importance attached to ERISA plans which have emerged from the collective bargaining process, and which accordingly reflect the wishes of the very workers who will be the participants of the benefit and health plans. (Alessi, 451 U.S. 504, 524-526, supra. See also Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 330, supra.)

These observations, too, suggest that ERISA's preemption clause carries an implied exemption for labor-management relations laws.

D. Corresponding Internal Revenue Code Provisions Further Support Exemption.

As petitioners point out, various Internal Revenue Code provisions are designed to facilitate enforcement and administration of ERISA. One such provision also indicates that Congress intended to exempt from preemption state laws regulating collective bargaining rights. Internal Revenue Code section 410(b) addresses minimum participation standards for ERISA-covered employee retirement plans. However, subsection 410(b)(3)(A) specifically excludes from these participation requirements any employees who--by exercising their right to bargain about such benefit plans--have elected an alternative benefit package.10/

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10. Specifically, subsection 410(b)(3)(A) provides for exclusion of:

> (A) employees not included in the plan who are included in a
>
> (Footnote Continued)

In other words, the participation standards of ERISA are subordinated to those of retirement plans achieved by employees through good faith collective bargaining. Rather than preempting agricultural employees' rights to bargain about benefit plans under the ALRA, then, ERISA and its accompanying Internal Revenue Service regulations recognize that such bargaining rights are paramount. Congress could not have intended to weaken such rights by forbidding the states from remedying violations of the bargaining duty.

Footnote Continued)

> unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.
>
> (Emphasis added.)

And where, as here, an area of traditional state regulation is exempted from the generally broad scope of ERISA's preemption provision, Metropolitan Life teaches that such state laws--even if they "relate to" employee benefit plans in some fashion--are simply not preempted.

Thus, the result reached by the courts below would be correct even if petitioners had been able to present a state law which "relates to" ERISA plans within the meaning of section 514.

CONCLUSION

For the reasons presented above, respondents respectfully urge the Court to deny the petition for writ of certiorari.

Dated: October 20, 1986

Respectfully submitted,

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